Updating the Commander's Toolbox

New Tools for Operationalizing the Law of Armed Conflict

BY LAURIE R. BLANK AND AMOS N. GUIORA

Gone are the days of soldiers facing off across large battlefields, tanks shelling tanks, and fighter jets engaging in dogfights. Armed conflict now takes place *everywhere*—in cities, refugee camps, and other historically nonmilitary areas—and involves or impacts nearly everyone in the area. The law of armed conflict (LOAC)—codified in times of more traditional state-state conflicts—must now adapt to these new and infinitely more complicated conflicts, which we call *new warfare*. More important, we need to recategorize the ever-expanding variety of individuals who now participate in and are affected by hostilities, posing great challenges to the implementation of LOAC on the ground.

LOAC, otherwise known as the *laws of war* or *international humanitarian law* (IHL), governs the conduct of states and individuals during armed conflict and seeks to minimize suffering in war by protecting persons not participating in hostilities and restricting the means and methods of warfare.[1] We will use the term *LOAC* because it is favored by militaries—the key players here—and when referring to *IHL*, we will do so interchangeably with *LOAC*.

New warfare poses extraordinary dilemmas for the application of two key principles. The principle of distinction requires soldiers to differentiate between people they can target and people they are obligated to protect. The principle of proportionality requires soldiers not to attack a target if the expected innocent casualties are excessive in relation to the anticipated military advantage.

The essence of new warfare is that states engage with nonstate actors. In traditional conflicts between states, pitting soldier against soldier, the categories were clear; in what we call new warfare, however, the categories are—at best—blurred. In the current conflicts in Iraq and Afghanistan, for

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1. REPORT DATE **JUN 2010**	2. REPORT TYPE	3. DATES COVERED **00-00-2010 to 00-00-2010**	
4. TITLE AND SUBTITLE **Updating the Commander's Toolbox: New Tools for Operationalizing the Laws of Armed Conflict**		5a. CONTRACT NUMBER	
		5b. GRANT NUMBER	
		5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)		5d. PROJECT NUMBER	
		5e. TASK NUMBER	
		5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) **National Defense University,Center for Complex Operations,260 Fifth Avenue,Washington,DC,20319**		8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)	
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT **Approved for public release; distribution unlimited**			
13. SUPPLEMENTARY NOTES			
14. ABSTRACT			
15. SUBJECT TERMS			

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT **unclassified**	b. ABSTRACT **unclassified**	c. THIS PAGE **unclassified**	**Same as Report (SAR)**	**20**	

example, military forces face a disturbing and potentially tragic lack of clarity regarding *both* the operational mission *and* identification of the enemy.

When those who are fighting (insurgents, guerrillas, terrorists) melt into the civilian population and persons who appear to be civilians periodically engage in hostilities, determining who is a legitimate target becomes nearly impossible. Even if commanders respect the law, they will be hard pressed to apply it in new warfare if it is not relevant—and if it is exacerbating challenges rather than facilitating solutions. We therefore examine how to distinguish between innocent civilians and legitimate targets and develop more relevant and specific categories to define the many varieties of the latter. With these tools, commanders can train troops to make the critical determination of whom and when they can shoot and whom they have to protect.

Commanders view the zone of combat in terms of friend or foe, innocent civilians or legitimate targets. An *innocent civilian* takes no part in hostilities and is immune from attack. A *legitimate target* is a person or object that can be lawfully targeted. In new warfare, the

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range of persons in this latter category has expanded rapidly. This expansion requires two critical adjustments in approaching "open fire" determinations: greater sensitivity to *new* subcategories of hostile persons, and a more conduct-specific checklist of factors for determining if an individual can be targeted. We define and analyze each of the following key subcategories:

- ❖ *Legitimate subjects of detention* provide some assistance to those who are fighting but do not participate directly in hostilities. They cannot be targeted.

- ❖ *Transitory targets* participate in hostilities one or two times or with no regularity. They can only be targeted when directly participating in hostilities.

- ❖ *Recurring targets* follow a recurring and frequent pattern of participation in hostilities, returning to civilian pursuits in between their hostile acts. They can only be targeted when directly participating in hostilities, unless the frequency and regularity of their participation rises to the level of more continuous participation.

- ❖ *Permanent targets* participate in hostilities on a continuous basis. They can be targeted at all times.

Our purpose is to operationalize LOAC to give commanders the tools to meet twin goals: fulfilling operational missions while protecting soldiers and innocent civilians alike. This twofold objective is extraordinarily complicated; it is also an absolute necessity.

In the first section, we highlight the challenges new warfare creates for the implementation of LOAC on the ground. The second section analyzes how to operationalize LOAC, focusing on a new framework for identifying and distinguishing among legitimate targets. The last section offers recommendations for the application of LOAC to new and as yet unforeseen challenges from newer and ever more complex conflicts.

Challenges of New Warfare

Concerns about the applicability of LOAC to new warfare have recently grown into a steady drumbeat, ranging from serious concern about implementing and enforcing critical LOAC principles to claims that the Geneva Conventions are "quaint" and "obsolete."[2] Although LOAC was indeed codified before the onset of new warfare, its fundamental principles are more important than ever *precisely* because of the increased danger to participants and nonparticipants alike.

Defining terms relevant to conflict and analyzing the rules applicable in new warfare are helpful but do not address the commander's needs. We take a more practical approach. LOAC simply must be flexible and adaptable enough to be effective in new warfare. Otherwise, entire conflicts will go unregulated and entire categories of individuals will be left unprotected, a choice neither LOAC nor commanders can countenance.

Humanitarian law is a living, breathing body of statutes, not a static set of concepts, and it has repeatedly been adapted to uncertainties and changing circumstances. LOAC principles are the "bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination."[3] Examining the challenges commanders and soldiers face demonstrates that overly technical reliance on conventional legal prescriptions handicaps the decisionmaker and undermines civilian protections.

International courts and tribunals have used this approach when confronted with new issues. In the 1996 *Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict*, the International Court of Justice emphasized that new means of combat do not "call into question the longstanding principles and rules of international law,"[4] and found that humanitarian law does apply to the use of nuclear weapons.[5] Similarly, in *Prosecutor v. Dusko Tadic*, the International Criminal Tribunal for the Former Yugoslavia relied on the object and purpose of the Geneva Conventions and fundamental principles of IHL to find that allegiance, not nationality, was the crucial test for determining protected person status.[6] In new warfare, the blurring of civilian and fighter, of military objective and protected object, does make LOAC's application difficult. But that difficulty does not justify abandoning the law and its key principles.

Key Concepts

New warfare generally involves states in combat with nonstate forces and fighting in highly populated areas with a blurring of the lines between military forces and civilian persons and objects. As one article recently reported on Afghanistan:

> [t]*he elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers' homes and fields, and attack Marines from spots with ready escape routes. The Marines, under strict rules to protect civilians, must wait for insurgents to attack and then attempt to ensnare them. Limited in their use of airstrikes and artillery—because of the danger to civilians and because aircraft often frighten the Taliban away—Marine riflemen must use themselves as bait and then engage in the riskier task of pursuing insurgents on foot.*[7]

Although civilians have historically been the victims of war, new warfare is fundamentally different because of their active

involvement—in fact, engagement—in hostilities. Understanding when these individuals cross the line from innocent civilians deserving protection to hostile persons justifying the application of force is the key question new warfare poses for commanders on the ground.

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Operationalizing international law requires that we adapt LOAC to the realities of new warfare through new training regimes and different operational guidelines; otherwise, the commander will be in the "twilight zone," which poses extraordinary dangers to soldiers, innocent civilians, and others. In the classic military paradigm, the conflict—from a command perspective—was easily explained. The objective—to defeat a clearly identified enemy—was easily articulated; the means—military hardware—were obvious; and the outcome, from a military perspective, was black and white: one side surrendered. Opposing soldiers carrying weapons posed dangers leading to precise "open fire" orders. The rules of engagement (ROEs) were uncontroversial and simple to interpret: soldiers killed soldiers and protected innocent civilians. In that sense, the rules of yesterday's battles were "obvious."

In the contemporary and future paradigm, the overwhelming majority of armed conflicts involve soldiers operationally engaged with nonstate actors. The commander is legally required to distinguish between an innocent civilian and an individual who, although dressed in civilian attire, poses an immediate threat and is therefore a legitimate target. The commander must also assess whether and when to target hostile persons deliberately hiding among the civilian population. In a word, both sets of persons appear to be innocent civilians, so the rules produce controversy and uncertainty. Operationalizing LOAC gives commanders the tools to distinguish between innocent and hostile persons, knowledge that is key to protecting their own soldiers and innocent civilians.

The fundamental principle of *distinction* requires that any party to a conflict[8] distinguish between those who are fighting and those who are not, and direct attacks only at the former.[9] The purpose of distinction—to protect civilians—is emphasized in Article 51 of Additional Protocol I, which states that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[10] Article 51 also prohibits indiscriminate attacks,[11] extending the obligation beyond a prohibition on directly targeting innocent civilians. The Statute of the International Criminal Court criminalizes attacks on civilians in both international and non-international armed conflicts.[12] The jurisprudence of the ad hoc international criminal tribunals also emphasizes that the principle of distinction is customary international law applicable in both international and non-international armed conflicts.[13]

Proportionality is the primary mechanism for implementing distinction in practice. To protect innocent civilians from the effects of war and minimize undue suffering, LOAC prohibits disproportionate attacks in two ways. First, before launching an attack, commanders must examine whether the expected loss of civilian life would be excessive in relation to the anticipated military advantage gained.[14] If the attack would likely have a disproportionate effect, it must be

canceled.[15] International courts and national military manuals use a "reasonable commander" standard based on the circumstances at the time to determine proportionality.[16] Second, commanders must seek to minimize civilian losses when targeting a military objective. Even if a target is legitimate according to the laws of war, failure to take the requisite precautions would make the attack unlawful.[17]

Commander's Perspective

In early 2006, the Multi-National Corps–Iraq (MNC–I) began compiling statistics about escalation of force incidents in Iraq,[18] primarily situations in which civilians "unwittingly drove too close to convoys or checkpoints and triggered a reaction in gunners who considered them a threat."[19] MNC–I recorded 10 escalation of force incidents per day in January and February 2006, with 5 percent resulting in civilian deaths and 11 percent in civilian injuries,[20] and estimated that over 1,000 Iraqi civilians were killed in such incidents between 2003 and early 2006.[21] Preplanned attacks can also result in significant civilian deaths when the lines between legitimate target and innocent civilian are blurred. In Pakistan, where U.S. drones attack al Qaeda and Taliban leaders, it is estimated that "more than 600 civilians are likely to have died," or 10 civilians for every militant killed.[22] These statistics illustrate the fundamental question commanders confront in combat—whether and when to give an open fire order.

Distinguishing hostile from innocent persons requires new training methods and understandings of operational dilemmas. Military training for new warfare is extraordinarily complex: we train soldiers to shoot (and if necessary, to kill), but at the same time, we require them to wait an additional second precisely to verify that the individual they face poses an immediate threat and is therefore a legitimate target. In the zone of combat—which replaces the traditional battlefield—an extra second can literally be the difference between life and death. If the soldier waits that extra second, he will likely be killed if the individual is not an "innocent." Conversely, if the soldier does not wait and, failing to evaluate the threat presented sufficiently, fires at an innocent individual, the never-ending cycle of violence and human tragedy may escalate. Training 19-year-old soldiers to wait is counterintuitive, but new warfare makes it *essential* from a command perspective.

Commanders also face the basic operational reality of 19-year-old soldiers: they are scared, sometimes actively dislike what they are doing, and possess fully loaded weapons. If the

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requirement to wait is unclear in training, operational realities make it infinitely more complex and dangerous. The following examples illustrate these dilemmas:

❖ A battalion commander ordered to target three suspected terrorists plans a military operation that will minimize damage to innocent civilians while engaging the suspected terrorists. Approaching the zone of combat, the commander receives reliable and credible intelligence that hundreds of children are in the immediate vicinity. Although the mission is legal, the

children raise significant operational dilemmas for the commander. If he decides to go forward, there is a reasonable chance of greater than minimal collateral damage. If he aborts, the unit's retreat in full view of the local community may negatively impact the state's deterrent effect. The commander must decide whether to adopt a tactical approach (predicated on the here and now) or a strategic perspective (target the terrorists in the future if they are not planning an immediate attack).

❖ A commander reports an attack from a particular position and requests air support against the individual he has identified as the shooter. The helicopter pilot responds that he cannot determine with sufficient certainty that the individual the commander identified is indeed the shooter. The commander and the pilot share a similar goal (to kill the actual shooter), but their differing perspectives on how to use the available information (what they saw/ believed they saw) lead them to different conclusions directly affecting how they carry out their legal obligations and operational missions.

❖ A commander receives a single-source report regarding individuals presenting an immediate threat to his unit but concealed in a crowd of civilians. The commander conveys that report to air support but lacks specific identifying information and cannot pinpoint the individuals' location within the crowd. Although the pilots cannot positively identify the individuals, they nevertheless fire into the crowd, killing numerous civilians. They may have killed the reported suspects—but they cannot confirm if they did.

The presence of individuals dressed in civilian clothing is the complicating variable. Some are hostile persons disguised as civilians; others are innocent civilians in the wrong place. But the immediate dangers the former pose and the obligations created by the latter are unclear. Without more focused guidelines for commanders, new warfare's inherent ambiguousness will result in the continued tragic loss of innocent lives.

Limitations of the Traditional Framework

The Combatant-civilian Paradigm. LOAC traditionally classifies individuals as either combatants or civilians and fits all persons within one of these two categories.[23] The Geneva Conventions use the term *combatant* to denote a particular status in international armed conflicts. All members of the regular armed forces of a state involved in an international armed conflict are combatants.[24] In addition, members of armed groups or militias belonging to a state party in an international armed conflict qualify as combatants if, as a group, they fulfill four conditions: operate under a responsible command, wear a fixed distinctive sign, carry arms openly, and respect the laws of war.[25] Combatants have a right to participate in hostilities and have immunity from prosecution—combatant immunity—for lawful acts taken during combat. In addition, combatants are lawful targets at all times except when they are *hors de combat* because of sickness, wounds, detention, or other causes.[26] All combatants must distinguish themselves from the civilian population; failure results in forfeiture of combatant immunity for acts taken during such time.

LOAC defines civilians as all persons in an international armed conflict who are not combatants.[27] In non-international armed conflict, civilians are all persons who are not members of armed forces

or armed groups.[28] When there is doubt about a person's status, he is considered a civilian.[29] As discussed above, civilians are immune from attack and must be protected as much as possible from the effects of conflict. Civilians who take up arms, however, lose their immunity from attack during the time they participate in hostilities—whether permanently, intermittently, or only once—and become legitimate targets.[30] Even though they are fighting, they retain their civilian status in the traditional framework because they do not fit the definition of combatant.[31] The term *civilian* is therefore confusing because it includes persons who are legitimate targets and persons who are protected.

This traditional approach falters in the face of new warfare's complexities. Most persons in new warfare fit into the traditional category of civilians because they are not members of nonstate armed forces or the regular armed forces of a state. Many of these individuals engage regularly in hostile acts but—because they are traditionally categorized as civilians—are legitimate targets only when meeting the specific test for directly participating in hostilities; that is, they attack at will but can only be attacked at specific and limited times.[32] As a result, they gain a measure of protection they otherwise would not have, and the law's traditional mandate that any doubts be resolved in favor of civilian status effectively acts as a "free pass."

The many terms used to describe individuals participating in hostilities—*unlawful combatant*, *unprivileged belligerent*, *enemy combatant*, to name a few—do not help commanders make effective and lawful operational decisions regarding their treatment (that is, target, detain, protect). Tarring all hostile persons with the same brush ignores the critical distinctions that impact operational decisionmaking and leaves commanders lacking specific and relevant guidelines for action.

Distinction and Proportionality: Principles under Fire. The great fluidity between hostile persons and innocent civilians, and the conscious blending of hostile persons into the civilian population, makes a soldier's task nearly impossible. For example, a soldier manning a checkpoint sees a jeep speeding toward him—is it friend or foe? It could be civilians seeking

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aid or fleeing from danger or insurgents using the vehicle as a suicide bomb. The soldier who reacts too soon and fires on the vehicle risks killing innocent civilians; the soldier who waits to make a positive identification risks dying in a fiery explosion. Neither choice is acceptable from a tactical or legal standpoint. Insurgents take advantage of this dilemma to gain an edge over the superior fighting capabilities of state forces. In Afghanistan, for example, the Taliban regularly "use a tactic of engaging coalition forces from positions that expose Afghan civilians to danger,"[33] forcing U.S. troops either to hold their fire in the face of an attack or endanger innocent civilians—a lose-lose situation.

The expanding range of persons involved in new warfare and the great difficulty in identifying and distinguishing among individuals have also complicated the application of proportionality. Persons who participate in hostilities are legitimate collateral damage, even if they could not be targeted directly at the moment of an attack. If a commander cannot determine who is a legitimate target, who constitutes legitimate
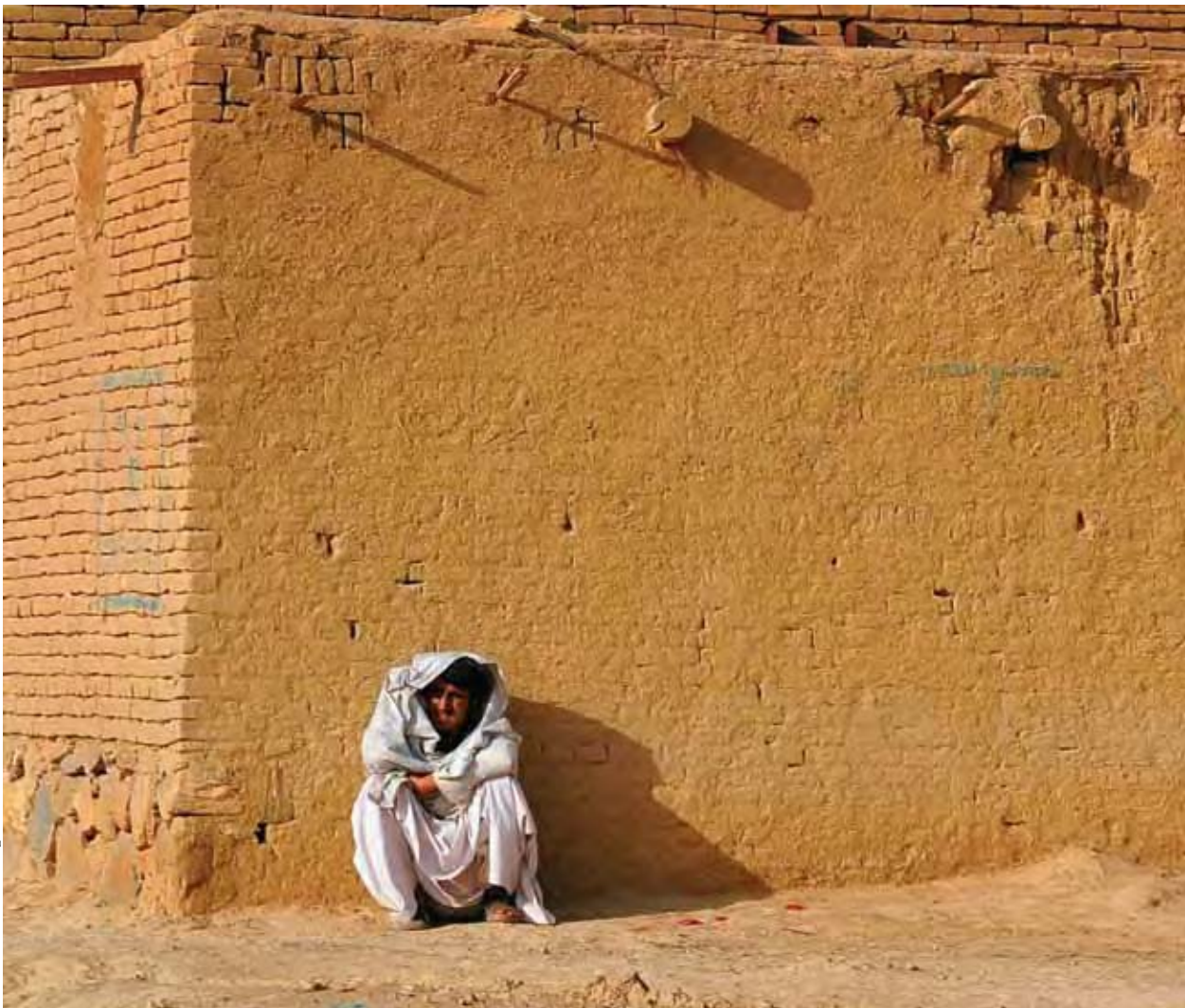
collateral damage, and who is an innocent civilian, however, his ability to fulfill his legal obligations is severely handicapped.

Current strategy in Afghanistan starkly illustrates how these challenges affect strategic and tactical approaches. Revised U.S. tactical doctrine in Afghanistan now identifies the protection of civilians—from both Taliban attacks and U.S. counterinsurgency operations—rather than the number of enemies killed as the mission's primary goal.[34] International Security Assistance Force (ISAF) Supreme Commander General Stanley McChrystal announced that:

> *bombs could be dropped only when* solid *intelligence showed that high level militants were present or U.S. forces were in imminent danger* [and] *made it clear he would rather allow a few rank-and-file Taliban fighters to get away than to flatten a house whose occupants might include women and children.*[35]

Individuals in civilian clothing could be either hostile persons disguised as civilians or innocent civilians in the wrong place

The following description of two primary types of airstrikes U.S. forces employ emphasizes the dilemmas they encounter:

> Largely due to increased intelligence, strikes planned in advance have caused zero civilian casualties in the past two years. . . . The daily activities of suspected militants are tracked and analyzed to ensure that civilians are not mistakenly targeted.

> The second type of air strike is a result of "troops-in-contact." . . . During impromptu strikes, there is not sufficient time to complete a formal collateral damage assessment, resulting in property damage, injury, and death of innocent Afghans. In 2006 and 2007, almost every civilian casualty caused by NATO [North Atlantic Treaty Organization] was a result of this type of incident. The increase of insurgent

tactics that include firing from homes and other populated areas has significantly boosted civilian casualties. Instead of calling in troops-in-contact air strikes, soldiers are increasingly being encouraged to withdraw and disengage when confronted by overwhelming force.[36]

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Tactical goals of reducing or eliminating civilian casualties in Afghanistan have led the United States to forego the balancing inherent in a proportionality assessment in favor of a mandate to protect civilians at all costs.

Operationalizing LOAC: Targeting Parameters

Soldiers can no longer simply distinguish between combatants and civilians because that leaves open the question of which civilians are targets and which are innocent. They must also distinguish between innocent civilians who take no part in hostilities—and deserve protection from attack—and hostile persons who participate directly in hostilities and are therefore legitimate targets. Existing applications of LOAC do not help, however. To make LOAC effective, the key is to identify several new categories of hostile persons, each requiring unique operational assessments and responses. Commanders then need a checklist of conduct-specific factors to guide decisionmaking.

A New Framework for New Warfare

At first glance, categorizing individuals in conflict as either innocent civilians or legitimate

targets may seem unorthodox; after all, LOAC provides detailed prescriptions for identifying persons as combatants, volunteer militia, protected persons, and others. When assessing rights and obligations, these traditional categories and the distinctions among them are crucial. However, to provide relevant and focused guidelines for commanders and troops on the ground, the only important distinction is between those who can be attacked and those who cannot.

We use the term *innocent civilians* to refer to only those persons who retain their immunity from attack at all times. Persons who actively participate in hostilities are legitimate targets and therefore do not belong in the same category as innocent civilians even though LOAC traditionally places both groups within the same civilian category. Here we depart fundamentally from the traditional LOAC approach: we divide the traditional category of civilians into those who are immune from attack and those whose conduct makes them a legitimate target. Most importantly, we redefine the category of legitimate targets and emphasize the need for a narrower, conduct-specific analysis of such persons, thus reconfiguring the classification of individuals in conflict.

A *legitimate target* is an individual who can be lawfully attacked during hostilities. We must differentiate among the numerous categories of these individuals because not all can be targeted at all times. One category of legitimate target is combatants and members of organized armed groups, who can be targeted at all times.[37] The latter primarily includes individuals who fight on a regular and recurring basis on behalf of a nonstate party.[38] Commanders can sometimes identify these targets by evidence of their status, such as a distinctive sign or other identification. In new warfare, however, members of organized armed groups often purposely intermingle with civilians and disguise themselves by hiding within the civilian

population. In these situations, commanders cannot distinguish by status, but must analyze conduct instead to determine whether these persons present a threat. As one U.S. Marine in Afghanistan asked, "What does a Taliban or Al Qaida fighter look like? Can you determine the enemy's identity by the equipment they use?"[39]

We focus here primarily on other hostile persons, those who traditionally fall within the category of civilians but are taking part in hostilities. However, the factors commanders use to identify and distinguish among the four subcategories below will be equally useful when identifying members of armed groups using conduct-specific factors as well.

A New Understanding of Who Is a Legitimate Target

Direct participation in hostilities separates persons who can be lawfully targeted from innocent civilians.[40] Courts and commentators have struggled to define the parameters of direct participation, but we will not engage in a thorough analysis of these efforts here. Rather, we define *direct participation in hostilities* as acts intended to harm the enemy or the civilian population in a direct or immediate manner. We also address persons providing lesser assistance to those who are fighting: although their acts do not constitute direct participation in hostilities, these individuals are no longer innocent civilians and must fit within the commander's operational decisionmaking framework.

Using new subcategories to define these persons, we operationalize LOAC for new warfare by giving commanders effective tools to distinguish among persons in the zone of combat. Commanders can then determine whom (and how) to target, whom to detain, and whom to protect—the only way to meet the twin goals of mission success and protection of innocents.

Legitimate Subject of Detention. An emerging and prevalent actor in new warfare is the individual providing some assistance or support to those who are fighting, such as a farmer in Afghanistan who allows Taliban militants to fire missiles from his land a single time. The commander will certainly want to question him about others providing assistance or engaging in hostilities. This person is not participating in hostilities because he is not directly engaging in acts causing harm to the enemy or the civilian population and is therefore *not* a legitimate target. However, by providing support to the militants, he is no longer an innocent meriting protection. If U.S. forces open fire on the Taliban militants and the farmer is killed, he is therefore legitimate collateral damage. Operationally, the commander must recognize the conduct of persons in this category for three reasons: first, this person is not a legitimate target and cannot be the subject of an open fire order; second, this person does not need to be protected from the effects of military operations to neutralize the militants using his property; and third, this person is a *legitimate subject of detention* and interrogation.

Transitory Target. Persons directly participating in hostilities a single time or intermittently are legitimate targets only when preparing for, engaged in, or returning from hostilities. When not engaged in hostilities, these *transitory targets* can be detained and prosecuted for their acts. Suicide bombers and persons who plant roadside bombs are transitory targets—they are legitimate targets only when they are engaged in or on their way to or from their mission—as are those who provide logistical support to these bombers. Another type of transitory target is the financier of terrorist attacks—wiring funds for the attack is the direct participation in hostilities justifying a targeting decision.

Recurring Target. Some transitory targets participate in hostilities with sufficient frequency and regularity that they become *recurring targets*. Whereas transitory targets engage in hostilities one or two times with no pattern or regularity, recurring targets participate on a regular and frequent basis. An example is the mailman who picks up his gun every Tuesday and Friday night to go out and shoot at U.S. patrols. Similarly, the farmer who allows his property to be used for launching attacks on a regular and frequent basis could, over time, be directly participating in hostilities as a result and would therefore become a recurring target. In these circumstances, before acting to detain or neutralize this target, the commander would need to determine whether the farmer is voluntarily providing this regular assistance or is being coerced. Like transitory targets, recurring targets are only legitimate targets when directly engaged in hostilities and only if no other viable alternatives exist, such as detention.

Permanent Target. In new warfare, a variety of persons play a continuous role in hostilities and are therefore *permanent targets*, meaning that they are legitimate targets at all times. Operationally, however, commanders should consider viable alternatives before issuing an open fire order,

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targeting these permanent targets when they are engaged in hostilities but detaining them if feasible at other times.[41] Examples of permanent targets include makers of improvised explosive devices (IEDs), suppliers and makers of suicide bomber belts, and planners of terrorist attacks. In certain circumstances, recurring targets may participate with such regularity and frequency that their level of engagement makes them more akin to a permanent target, an analysis that will be fact-specific and dependent on intelligence.

Checklist of Conduct-specific Factors. Understanding how to distinguish among these subcategories is one of the most important tools a commander needs in new warfare—and a key skill that he must impart to his troops. The following questions provide a checklist of conduct-specific factors for determining whether a person is a legitimate target and, more important, in which subcategory he belongs:

The Act:

- ❖ Is it direct?
- ❖ Is it mere assistance?
- ❖ If yes, is it voluntary or coerced?

Regularity:

- ❖ Is the act or assistance occurring on a regular or recurring basis?
- ❖ Have the quality and nature of the act or assistance escalated?
- ❖ Has the person done the act or provided the assistance before?
- ❖ Is there information about future plans to repeat the act?

Source/Intelligence:

- ❖ Is the source (if human intelligence) defined as reliable by the Intelligence Community?
- ❖ Is the information valid, viable, credible, and corroborated?
- ❖ Did the commander or soldiers positively identify the target "in the act"?

❖ If there was prior intelligence, does the unit's visual identification "match" the intelligence?

Intelligence Value: Is the person acting or providing assistance considered an important intelligence asset if detained and questioned?

Guidelines for New Warfare

The Commander's Top 10 gives the commander additional tools to apply LOAC effectively in new warfare. These tools were not in his predecessor's toolbox, a toolbox that has proven inadequate to new warfare's challenges. The "commandments" below are key to understanding and respecting LOAC and are necessary for commanders and their troops to fully operationalize IHL. Without them, tragedy is just around the corner.

1. *Demand clear mission articulation from senior command, including conditions for aborting or altering the mission.* If they fail to provide clearly articulated mission objectives, senior command and national policymakers do junior commanders a fundamental disservice.[42] Changing the mission's purpose confuses and endangers soldiers and commanders alike.[43] While missions invariably change—an operational reality—the core purpose must be consistent. A commander must demand this clarity and consistency from his superiors; without it, both his leadership and his unit's discipline will be at significant risk.

2. *Provide clear mission articulation to soldiers.* From a practical perspective, each operational mission—from targeting a specific individual to a regular foot patrol—needs an articulated purpose. For missions targeting a specific individual, commanders must brief soldiers regarding who the target is and why he is a target; how they can identify him; when and whether they are to detain or open fire; and any circumstances that would change the ROEs. Patrols, the most

routine of duties, require a different approach because their numbing routine makes them inherently dangerous. Commanders must brief soldiers regarding potential targets that they may encounter and the ROEs relevant to each of

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those targets. Unlike a specific targeting mission, a patrol does not seek to engage a particular individual; however, the range of legitimate targets the patrol may encounter necessitates that each soldier understand how to identify these distinct threats, how to distinguish among them, and how different operational responses are required.

3. *Train soldiers to be "operational" for the mission.* Training a soldier to identify a legitimate target is an extraordinarily difficult aspect of new warfare—particularly when that target is dressed no differently from an innocent civilian. Identifying a legitimate target relies on a combination of several factors:

❖ the individual's specific behavior, including dress, body language, activity, and verbal communications

❖ intelligence about that individual

❖ intelligence about a *broader threat* when the individual fits the intelligence.

Training must emphasize to soldiers the fundamental requirement to avoid generalizations, profiling, and collective punishment. Any operational response—particularly in the context of new warfare—must be person-specific in both targeting missions and routine patrols.

To maximize operational impact on nonstate actors while minimizing collateral damage, future military training for new warfare must focus on the four subcategories of legitimate targets we define. Discerning the threat—and acting neither too soon nor too late—depends on minimizing ambiguity by training soldiers to develop and use a checklist for distinguishing between innocent civilians and legitimate targets and differentiating among the various types of legitimate targets.

4. *Demand ROEs specifying when to issue open fire orders for previously and individually identified legitimate targets.* A previously identified target is an individual, such as a bomb maker, identified as a legitimate target based on intelligence. An operational plan to target this individual requires clear ROEs specifying when soldiers can and cannot open fire. Soldiers undoubtedly prefer concise and precise ROEs, but these rules must reflect operational reality. If the warfare is ambiguous, ROEs will, unfortunately, not be precise and concise. The key to operationalizing LOAC effectively in new warfare is to provide useful guidelines for soldiers in the midst of this ambiguity.

5. *Demand clear ROEs defining legitimate targets.* Soldiers also need clear ROEs for identifying when and whether persons they encounter, such as a suicide bomber or IED planter, are legitimate targets. ROEs for these individuals are person- and conduct-specific and subject to greater interpretation than those for a previously identified target. Determining whether an individual is a threat at a specific moment (and therefore a legitimate target) depends on discretion and a number of situation-dependent variables, including field conditions, the threat presented, number and type of people in the vicinity, and events of the previous few days. Clear ROEs specifying who is a legitimate target and how to react will minimize the need for on-the-ground discretion and, in ambiguous situations, give soldiers the tools to exercise their discretion in accordance with both LOAC and the mission's purpose.

6. *Include soldiers who speak the local language and are experts on the local culture in each unit.* A soldier who speaks the relevant local language and understands the culture greatly enhances a patrol commander's ability to communicate with local populations and can help the commander collect information about the community directly. With these skills and an understanding of the different types of legitimate targets, this soldier can give the commander information otherwise unavailable through indirect communication. For example, in the immediate aftermath of an attack on the unit, the commander needs the most accurate information possible to make critical operational decisions. In real time and in the "fog of war," commanders need to identify and distinguish between targets and innocent civilians and give effective warnings to the latter before taking action.[44] When locals do not understand soldiers' warnings, language and cultural skills in the unit give the commander the tools to fulfill these legal and operational obligations.[45]

7. *For international forces, ensure full integration of ROEs and mission articulation and, if possible, conduct joint training sessions.* International and multinational operations add another layer of complexity to new warfare's inherent ambiguities. Although part of a unified command, each country's forces have different military and political cultures and considerations informing their operational choices. The September 4, 2009, airstrike on the Taliban-hijacked fuel tankers near Kunduz, Afghanistan, is an instructive example. After receiving reports that the tankers were hijacked and stuck in the riverbed, the commander of the German army base nearby ordered an airstrike by two American F–15 fighter jets that killed over 30 civilians.[46]

Soldiers in combat must make split-second decisions about legitimacy of targets

U.S. Air Force (Efren Lopez)

Subsequent reports and investigations raised questions about the German commander's ability to determine who was present at the scene and the decision to use airpower instead of a ground operation given those uncertainties.[47] At a systemic level, the incident unearthed confusion about the appropriate use of force as part of the larger mission. In the past, U.S. and other coalition forces in Afghanistan had urged the German forces to take a more aggressive approach.[48] Now, in the aftermath of ISAF's new tactical directive placing protection of civilians as the mission's highest priority and drastically limiting the use of airstrikes, the German action appears far too aggressive.

This example demonstrates the need for greater integration of mission articulation among international and multinational forces—both the broader mission purpose and the objectives of specific missions. Each national component of an international force must not only share the same broader mission goals, but—most importantly—must also share the same operational plan for achieving those goals. Different understandings of specific mission objectives lead to different definitions of legitimate targets, which can only create confusion and inconsistency in targeting and engagement decisions. To achieve better operational consistency, international and multinational forces must incorporate integrated training in identifying and reacting to legitimate targets and distinguishing among the various categories of legitimate targets for operational purposes. Otherwise, coordination at the highest levels will lose out to confusion and ambiguity on the ground.

8. *Request establishment of field detention centers.* Planning detention centers before an operation begins is an integral aspect of new warfare. Otherwise, commanders on the ground—whose primary mission is engaging the enemy and protecting civilians—will face scenarios for which they are not operationally trained, including issues of detainee rights, interrogation, and detention conditions. Commanders need

a detention center nearby to take any detainees as quickly as possible, minimizing soldiers' contact with the detainees and maximizing unit energies for the core operational mission. U.S. patrol

units, for example, receive training in the five S's of detainee handling—search, silence, segregate, safeguard, and speed to the rear.[49]

The Israel Defense Forces' March 2002 Operation *Defensive Wall* highlighted the problems that arise when detention centers are not an integral aspect of operation planning. Thousands of Palestinians were arrested daily without adequate advance arrangements. The initial screening was done in temporary, and not suitably prepared, facilities at brigade headquarters.[50] Criticizing the last minute arrangements, the Israeli Supreme Court stated that:

> the need for minimal detention conditions was a natural result of the operation. There was no surprise in the matter. There was the possibility of preparing appropriate divisions with suitable detention conditions. What was done a number of days after the beginning of the operation should have been done several days before it began.[51]

9. *Reduce unknown variables.* To minimize losses among soldiers and innocent civilians, commanders need comprehensive intelligence about both the innocent civilian population and potential legitimate targets. In particular, commanders need real-time information about meeting places, transportation, gathering locations, religious observance patterns, cultural celebrations, school locations and hours, hospital and health facility locations, and special needs facilities. By minimizing the unknown, this knowledge enhances target-specific military action, protects innocent civilians from mistaken targeting, and limits collateral damage. Without it, commanders will be unable to identify legitimate targets accurately and protect the innocent civilian community.

10. *Articulate distinctions between detainable targets and legitimate targets.* Distinguishing among persons using intelligence-, threat-, and category-dependent criteria for deciding when to detain and when to engage is the essence of LOAC and of effective military command. Failure to distinguish violates LOAC and—tragically—is too "easy" when under fire, a reality in new warfare. Commanders are under enormous strain to engage while also under extreme pressure to ensure person-specific engagement. The four subcategories we identify specifically address the tension between these pressures.

The previously mentioned dilemma regarding "waiting an additional second" is—operationally—the manifestation of distinguishing between legitimate subjects of detention and the other three subcategories of targets. A permanent target (bomb maker) or transitory target (suicide bomber) is a legitimate target; a farmer infrequently allowing his land to be used for firing weapons is not, even though he is unquestionably detainable. This approach meets LOAC's requirements and is equally important from an operational perspective because a detainee can provide—through lawful interrogation—important information that might otherwise be unavailable to the commander and his superiors. Using this information, the commander can more accurately determine which

other targets are targetable, which are detainable, and when changing operational circumstances make a detainable person targetable.

Future Recommendations and Analysis

Our new framework and guidelines operationalize LOAC for new warfare, but cannot necessarily tackle unforeseen challenges from future conflicts. To deal with the unknown, LOAC needs more agility, which means the law can adapt to changing circumstances and meet the needs of policymakers and commanders alike. It also means the law must allow for new ways of thinking that uphold the law's goals and principles precisely when they are under fire.

As new warfare became prevalent, and then predominant, the law did not adapt appropriately to its complications. The international community continued to focus on traditional visions of combatants and civilians, notwithstanding the disconnect between that framework and the reality on the ground. Critics argued that the law could no longer apply, when, in fact, they simply did not examine how it could apply in a more agile way.

We focus on maximizing that agility so LOAC can meet new warfare's demands while still preserving the principles and goals that form the law's foundation. The steps we take here are precisely the steps to take in future situations posing existential challenges to LOAC.

First, we analyze why new warfare creates grave difficulties for LOAC as traditionally applied. LOAC requires that commanders distinguish between those who are fighting and those who are not, but the traditional legal framework offers few clues for how to do so in new warfare. Future conflicts will almost certainly involve significantly greater use of cyber-warfare and technological capabilities that we cannot predict. In these situations, delineating between military and civilian objectives may prove almost impossible without new understandings of these legal terms relevant to future conflicts.

Second, we identify the key legal principles at risk in new warfare—distinction and proportionality. When new warfare makes distinguishing between persons extraordinarily complicated, fulfilling the obligations of distinction and proportionality becomes equally difficult. Future conflicts may pose unforeseen challenges for other legal obligations and principles whose application seems straightforward today; only by zeroing in on the specific principles can we maximize LOAC's adaptability in the future.

> when new warfare makes distinguishing between persons extraordinarily complicated, fulfilling the obligations of distinction and proportionality becomes equally difficult

Third, we use the basic goals of the legal principles at issue to create a new, more workable framework. Distinction and proportionality rely on the ability to classify and distinguish among persons in conflict, so we created new subcategories to sharpen commanders' ability to distinguish and respond accordingly. This step is critical to making LOAC agile; if we cannot find ways to adapt how we apply the law, we will be left only with the claims that the law can no longer work—an unacceptable result.

Fourth, we turn the new framework into operational, on-the-ground guidelines that make LOAC relevant and useful for commanders and policymakers. The conduct-specific checklist and the Commander's Top 10 above offer concrete steps to use the law effectively in training troops, preparing for missions, and

fulfilling these missions. With these new tools, commanders can distinguish between innocent civilians and legitimate targets and, just as important, distinguish among the various types of legitimate targets to find the best and most appropriate operational response for each situation. **PRISM**

Notes

[1] See International Committee of the Red Cross, *International Humanitarian Law in Brief*, available at <www.icrc.org/web/eng/siteeng0.nsf/htmlall/section_ihl_in_brief>. The law of armed conflict (LOAC) is set forth primarily in the four Geneva Conventions of August 14, 1949, and their Additional Protocols: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (GC II); Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (GC IV); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (AP I); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (AP II).

[2] Draft Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush, "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban" (January 25, 2002), reprinted in *The Torture Papers: The Road to Abu Ghraib*, ed. Karen J. Greenberg and Joshua L. Dratel (Cambridge: Cambridge University Press, 2005), 118–119.

[3] Jean Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1985), 59–60.

[4] Legality of the Threat and Use of Nuclear Weapons in Armed Conflict (Advisory Opinion), July 8, 1996, I.C.J. Rep. 226, 76.

[5] Ibid., 86.

[6] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Appeals Judgment, 166 (July 15, 1999); see also *Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-A, Judgment, 266 (November 16, 1998).

[7] Ann Scott Tyson, "In Afghanistan, A Test of Tactics Under Strict Rules to Protect Civilians, Marines Face More Complex Missions," *The Washington Post*, August 13, 2009, A6.

[8] See *Prosecutor v. San Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 22 (May 31, 2004); Christopher Greenwood, "Scope of Applicability of Humanitarian Law," in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck (Oxford: Oxford University Press, 2008), 45, 76.

[9] AP I, Art. 48.

[10] Ibid., Art. 51. See also AP II, Art. 13, emphasizing the principle of distinction in non-international armed conflict.

[11] AP I, Art. 51(2).

[12] Rome Statute of the International Criminal Court, Art. 8(2), July 17, 1998, 27 I.L.M. 1999.

[13] *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgment, 45 (December 5, 2003). See also *Prosecutor v. Zoran Kupreskic*, Case No. IT-95-16-T, Judgment, 524 (January 14, 2000); *Prosecutor v. Jean-Paul Akayesu*,

Case No. ICTR-96-4-T, Judgment, 616 (September 2, 1998); *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 110, 127 (October 2, 1995); Jean-Marie Henckaerts, "Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross* 87, no. 857 (March 2005), 179; *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc.6 rev. (1997), 178.

[14] AP I, Art. 51(5)(b).

[15] Ibid., Art. 57(2)(b).

[16] Galic, 58; The Canadian Law of Armed Conflict at the Operational and Tactical Level, Section 5, 27 (1992), available at <www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf>.

[17] See *Prosecutor v. Kupreskic*, 524; *Isayeva v. Russia*, 41 Eur. Ct. H.R. 847 (2005), 200; *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751, 81.

[18] Nancy Montgomery, "U.S. Seeks to Reduce Civilian Deaths at Iraq Checkpoints," *Stars and Stripes*, March 18, 2006.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Daniel Byman, *Do Targeted Killings Work?* June 14, 2009, available at <www.foreignpolicy.com/articles/2009/07/14/do_targeted_killings_work>.

[23] International Humanitarian Law and the Challenges of Contemporary Armed Conflicts.

[24] GC III, Art. 4(1).

[25] Ibid., Art. 4(2).

[26] See Ibid., Arts. 3, 13, 23; GC I, Art. 12; The 1907 Hague Convention No. IV, *Respecting the Laws and Customs of War on Land*, October 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, Art. 23.

[27] AP I, Art. 50. See also Department of the Army Field Manual 27–10, *The Law of Land Warfare*, available at <www.aschq.army.mil/supportingdocs/Fm27_10.pdf>. Nilz Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 16 (2009).

[28] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ed. Yves Sandoz, Christophe Swinarki, and Bruno Zimmerman (Geneva: International Committee of the Red Cross, 1987). Hereafter Protocol Commentary (4789).

[29] AP I, Art. 50. See also Protocol Commentary (1920).

[30] AP I, Art. 51(3). See also Protocol Commentary (1942); HCJ 769/02 *Public Committee Against Torture v. Government of Israel* (December 11, 2005); Kupreskic, 522–523.

[31] Simply stated, LOAC does not contemplate a category of persons who can fight but not be attacked, or who can be attacked but may not fight back—such a category of "quasi-combatants" would undermine the entire fabric of humanitarian law. See also Delalic, 269.

[32] See *Public Committee Against Torture v. Government of Israel*, 40.

[33] Jim Garamone, "Directive Re-emphasizes Protecting Afghan Civilians," American Forces Press Service, July 6, 2009. United Nations Assistance Mission to Afghanistan, *Human Rights Unit Mid Year Bulletin on*

Protection of Civilians in Armed Conflict, 2009, 35, available at <http://unama.unmissions.org/portals/unama/human%20rights/09july31-unama-human-rights-civilian-casualties-mid-year-2009-bulletin.pdf>.

[34] Headquarters, International Security Assistance Force, Kabul, Afghanistan, Tactical Directive, July 6, 2009, available at <www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf>.

[35] Garamone, emphasis added.

[36] J. Alexander Thier and Azita Ranjbar, *Killing Friends, Making Enemies: The Impact and Avoidance of Civilian Casualties in Afghanistan*, USIP Peace Briefing (Washington, DC: U.S. Institute of Peace, July 2008), 7. Emphasis in original.

[37] See Protocol Commentary (4789).

[38] International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, 2006, 4, available at <www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill.pdf>.

[39] Center for Law and Military Operations, *Legal Lessons Learned From Afghanistan and Iraq: Volume I—Major Combat Operations*, (11 September 2001–1 May 2003) (Charlottesville, VA: The Judge Advocate General's Legal Center and School, 2004), 98.

[40] AP I, Art. 51(3).

[41] These permanent targets should only be operationally targeted at all times if there is intelligence suggesting that they are planning for or engaged in future attacks.

[42] Amos N. Guiora and Martha Minow, "National Objectives in the Hands of Junior Leaders: IDF Experiences in Combating Terror," in *Countering Terrorism in the 21st Century*, ed. James J.F. Forest (Westport, CT: Praeger Security International, 2007).

[43] See Ann Scott Tyson, "Less Peril for Civilians, but More for Troops," *The Washington Post*, September 23, 2009, A1.

[44] AP I, Art. 57(2)(c).

[45] See International Security Assistance Force, U.S. Forces–Afghanistan, Commander's Initial Assessment, August 30, 2009, available at <http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf?sid=ST2009092003140>.

[46] Yochi J. Dreazen, "NATO Says U.S. Airstrike in Kunduz Killed Thirty Civilians," *The Wall Street Journal*, September 17, 2009.

[47] "New Allegations Against German Officer who Ordered Kunduz Air Strike," September 21, 2009, available at <www.spiegel.de/international/world/0,1518,650200,00.html>.

[48] Ibid.; also see Elizabeth Pond, "Germany's Combat Revival," *Christian Science Monitor*, August 7, 2009; "Germany is ISAF's Weakest Link," available at <www.acus.org/new_atlanticist/germany-isafs-weakest-link>.

[49] Field Manual 19–40, *Enemy Prisoners of War, Civilian Internees and Detained Persons* (Washington, DC: Headquarters Department of the Army, February 1976), 2–4(e).

[50] *Center for the Defense of the Individual v. IDF Commander in the West Bank* (HCJ 3278/02) ¶ 26.

[51] Ibid., see also *Marab v. IDF Commander in the West Bank* (HCJ 3239/02); Amos N. Guiora and Erin M. Page, "Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism," *Hastings International and Comparative Law Review* 29, no. 1 (2006), 51–61.